Office - Supreme Court, U.
FILED
OCT 17 1984
ALEXANDER L. STEVAS
CLERK

Nos. 84-237, 84-238, 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*, *Appellants*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION, *Appellant*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

CHANCELLOR OF THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK, *Appellant*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

CONSOLIDATED CASES

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for
Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS	v
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT:	
PROPERLY FLEXIBLE ESTABLISHMENT CLAUSE ANALYSIS SUSTAINS THE CONSTITUTIONAL VALIDITY OF THE TITLE I PROGRAM	2
A. Consideration of an Establishment Clause Challenge to the Title I Program Requires Thoughtful and Flexible Analysis	2
B. The Court of Appeals Applied Overly Strict Standards of Analysis to the Title I Program	4
1. The court of appeals interpreted the applicable standards so strictly as to make compliance with the Constitution logically impossible	5
2. The court of appeals treated religion as a harmful contaminant that must be absolutely nonexistent in government activities	6
3. The court of appeals construed the relevant standards into a harshly discriminatory obstacle to participation by religiously oriented entities in governmental activities	6
C. Application of Flexible Standards of Analysis Upholds the Challenged Title I Program	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980) 2-3

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 3,4,5,6

Engel v. Vitale, 370 U.S. 421 (1962) 9

Everson v. Board of Education, 330 U.S. 1 (1947) 4,7,8,9

Felton v. Secretary, United States Department of Education, 739 F.2d 48 (2d Cir. 1984) 3,5,6,7,9

Hunt v. McNair, 413 U.S. 734 (1973) 4

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... 1, *passim*

Lynch v. Donnelly, 104 S. Ct. 1355 (1984) 4,6,7,8

McDaniel v. Paty, 435 U.S. 618 (1978) 7

Meek v. Pittenger, 421 U.S. 349 (1975) 4

Mueller v. Allen, 103 S. Ct. 3062 (1983) 2,3,4,8,9

School District v. Schempp, 374 U.S. 203 (1963) 3,6,7,8

Sherbert v. Verner, 374 U.S. 398 (1963) 7

Stone v. Graham, 449 U.S. 39 (1980) 8

Tilton v. Richardson, 403 U.S. 672 (1971) 4

Torcaso v. Watkins, 367 U.S. 488 (1961) 8

Walz v. Tax Commission, 397 U.S. 664 (1970) 10

Wolman v. Walter, 433 U.S. 229 (1977) 8

Zorach v. Clauson, 343 U.S. 306 (1952) 6,7

STATUTES:

20 U.S.C. § 2701 (1982) 3

OTHER AUTHORITIES:

Catholic League for Religious and Civil Rights: J. Cibulka, T. O'Brien & D. Zewe, *Inner City Private Elementary Schools: A Study* (1982) 3

Coleman, *Public Schools, Private Schools and the Public Interest*, Am. Educ., Jan.-Feb. 1982, at 17 3

Greeley, Catholic High Schools and Minority Students, in *Private Schools and the Public Good—Policy Alternatives for the Eighties* 6 (E. Gaffney, Jr. ed. 1981) 3

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS

The Catholic League for Religious and Civil Rights respectfully moves this Court, pursuant to Rule 36.3 of its rules, for leave to file the accompanying brief *amicus curiae* in support of appellants Nos. 84-237, 84-238, 84-239. The consent of the parties has been sought. While written consent has been received from three of the four parties, written consent has not been received from the fourth party, the appellees.

The Catholic League for Religious and Civil Rights is a civil rights organization, national in membership, organized to combat all forms of religious prejudice and discrimination, and dedicated to the defense of the civil and religious rights of children to receive quality education, especially in communities where educational deprivation abounds.

Amicus believes that the decision and reasoning of the court of appeals creates a precedent for hostility and discrimination toward religion and religiously oriented entities. This decision impairs the religious freedom of such entities and, ultimately, of all citizens. *Amicus* believes that these religious freedom concerns may not be presented to the Court unless the brief *amicus curiae* is considered.

Therefore, *amicus* requests this Court to grant this motion and consider the accompanying brief in support of appellants.

Respectfully submitted,

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for
Amicus Curiae

Nos. 84-237, 84-238, 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*, *Appellants*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

SECRETARY, UNITED STATES
DEPARTMENT OF EDUCATION, *Appellant*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

CHANCELLOR OF THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK, *Appellant*,
v.
BETTY-LOUISE FELTON, *et al.*, *Appellees*.

BRIEF FOR THE CATHOLIC LEAGUE FOR
RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE,
IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The interest of The Catholic League for Religious and Civil Rights as *amicus curiae* is set forth in the Motion for Leave to File a Brief Amicus Curiae.

SUMMARY OF ARGUMENT

Educational assistance programs such as Title I serve important societal interests. Establishment Clause challenges to these programs raise complex and sensitive concerns, and call for deliberate but flexible adjudication.

The decisions of this Court explicitly authorize such flexibility in the application of the *Lemon* three-part guidelines to Establishment Clause cases. Nevertheless, the court of appeals applied

an overly rigid analysis to invalidate the Title I program at issue. That court construed the *Lemon* guidelines so strictly against the challenged program as to allow no possibility of compliance with constitutional standards. Moreover, the court depicted religion and religious elements as dangerous contaminants and raised an irrebuttable presumption against the constitutionality of the challenged program, merely on the basis of the potentiality of religious influences. With the application of such harshness, the court of appeals violated the constitutional requirement of neutrality toward religion, and placed seriously discriminatory obstacles in the way of participation in government activities and programs by entities with religious orientations.

Under the properly flexible constitutional standards, the challenged Title I program passes constitutional muster. This Court, in sustaining the program at issue, should emphasize the inappropriateness of hostility to religion in constitutional review and the need for flexible accommodation in the analysis of such cases.

ARGUMENT

PROPERLY FLEXIBLE ESTABLISHMENT CLAUSE ANALYSIS SUSTAINS THE CONSTITUTIONAL VALIDITY OF THE TITLE I PROGRAM.

Appellees contend that the Title I educational assistance program now implemented in New York City violates the Establishment Clause of the First Amendment to the Constitution. Application of the appropriate standards of analysis, however, demonstrates the constitutional validity of the challenged program.

A. Consideration of an Establishment Clause Challenge to the Title I Program Requires Thoughtful and Flexible Analysis.

Challenges to governmental programs providing educational assistance in nonpublic schools raise complex and sensitive issues, *Mueller v. Allen*, 103 S. Ct. 3062, 3065 (1983); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646,

662 (1980), particularly in light of lingering tensions between Establishment and Free Exercise Clause jurisprudence, *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *School District v. Schempp*, 374 U.S. 203, 222-23 (1963), and the important societal interests supporting effective educational programs. *Mueller*, 103 S. Ct. at 3066-67.

This Court has often remarked upon the key role of private educational institutions in promoting these societal interests in education, *Mueller*, 103 S. Ct. at 3070, and noted that "certainly private parochial schools have contributed importantly to this role," *Nyquist*, 413 U.S. at 795. Inner city private schools in particular play a uniquely valuable role in the promotion of racial integration, Coleman, *Public Schools, Private Schools and the Public Interest*, Am. Educ., Jan.-Feb. 1982, at 17; Greeley, Catholic High Schools and Minority Students, in *Private Schools and the Public Good—Policy Alternatives for the Eighties* 6 (E. Gaffney, Jr. ed. 1981), and in the provision of quality education to children from low-income families, Catholic League for Religious and Civil Rights: J. Cibulka, T. O'Brien & D. Zewe, *Inner City Private Elementary Schools: A Study* (1982).

Title I directs its assistance toward institutions "serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 2701 (1982). Assistance to inner city private schools thus forms an important and valuable segment of the Title I scheme. As the court below noted, "the program here under scrutiny has done much good and . . . [New York] City could reasonably have regarded it as the most effective way to carry out the purposes of [Title I]." *Felton v. Secretary, United States Department of Education*, 739 F.2d 48, 49 (2d Cir. 1984).

Given the value of fostering education through the enactment of assistance schemes such as Title I, and given the vital role of the programs here at issue in the effectuation of Title I, careful and deliberate judicial scrutiny becomes most appropriate. While the merits of the program would not justify otherwise unconstitu-

tional activity, the First Amendment does not exist to hamper religious schools, *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), and courts must take care to avoid mechanically and inflexibly invalidating challenged programs, *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361, 1365 (1984).

The decisions of this Court in Establishment Clause cases explicitly authorize the necessary flexibility. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) the Court summarized the standards for Establishment Clause scrutiny as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted). When it announced these Establishment Clause standards, the Court took care to warn against a strict or absolutist adherence to the three-part test: "The standards should rather be viewed as guidelines," since "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) (plurality opinion). Since the *Lemon* and *Tilton* decisions, the Court has repeatedly emphasized the need for flexibility in the application of the three-part test, *e.g.*, *Mueller*, 103 S. Ct. at 3066; *Meek v. Pittenger*, 421 U.S. 349, 358-59 (1975); *Nyquist*, 413 U.S. at 773 n.31; *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (three parts of test "no more than helpful signposts"). Just last Term this Court emphatically reaffirmed that "a rigid, absolutist . . . approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Lynch*, 104 S. Ct. at 1361.

B. The Court of Appeals Applied Overly Strict Standards of Analysis to the Title I Program.

Notwithstanding this clear and long-standing rule of flexibility in the disposition of Establishment Clause cases, the Court of Appeals for the Second Circuit applied a rigid analysis to the Title I scheme at issue here, and improperly invalidated the program. In its opinion the court constructed a test which rendered

compliance with the Establishment Clause logically impossible for appellant administrators of the Title I program. This impossible test arose in turn from an erroneously absolutist view of the place of religion in Establishment Clause analysis. Finally, this rigidity of analysis produced a level of scrutiny which discriminates against the participation of religiously oriented entities in governmental programs.

1. The court of appeals interpreted the applicable standards so strictly as to make compliance with the Constitution logically impossible.

In the view of the court of appeals, the Establishment Clause prohibits, not only the public funding of religious instruction, but even the mere theoretical "risk that public employees would consciously or unconsciously foster religion." 739 F.2d at 69. On the one hand, public personnel may not allow religious influences to affect their work, even unconsciously, *id.* at 64 n.15, since this would supposedly violate the "primary effect" part of the *Lemon* guidelines. On the other hand, the "active and extensive surveillance" necessary to prevent such religious influence from occurring would also violate the Constitution. According to the court of appeals, "this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion," *id.* at 66, and therefore such preventive measures would violate the third part—"excessive entanglement"—of the *Lemon* guidelines. Hence appellants find themselves in a Catch-22 situation in which they may neither conduct a routinely supervised Title I program, because that would entail an impermissible risk of fostering religion, nor conduct a program subjected to special supervision, because that would constitute excessive entanglement. The court below took the "Scylla and Charybdis of 'effect' and 'entanglement,' " *Nyquist*, 413 U.S. at 788, and moved them so close together that not even Odysseus could pass in safety.

2. The court of appeals treated religion as a harmful contaminant that must be absolutely nonexistent in government activities.

This impossible test which the court of appeals derived from the juxtaposition of the primary effect and excessive entanglement parts of the *Lemon* guidelines reflects a more fundamental error: the view of religion, in and of itself, as an evil against which the Establishment Clause protects. The opinion below speaks, for example, of "succumb[ing] to . . . religious influences," 739 F.2d at 65, and "stray[ing] into religious paths," *id.* Similarly, the court refers to the "danger that the religious atmosphere of the school will penetrate," *id.* at 66, and calls the fostering of religion a "harm," *id.* at 66, 72.

This view of religion as a "contaminant" which spoils otherwise constitutional programs both degrades religion and contradicts the spirit of the Religion Clauses. The Constitution commands a governmental attitude of neutrality, not hostility, toward religion. *Nyquist*, 413 U.S. at 788; *Schempp*, 374 U.S. at 225; *Zorach v. Clauson*, 343 U.S. 306, 315 (1952). In accordance with this mandate, the Court has rejected the notion that the mere presence of religious elements "would so 'taint' [an otherwise constitutional activity] as to render it violative of the Establishment Clause." *Lynch*, 104 S. Ct. at 1365. Such a ruling would represent a "stilted over-reaction contrary to our history and to our holdings." *Id.* The decisions of this Court do not require a choice between offending religion and offending the Constitution. On the contrary, this Court has explained that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any." *Id.* at 1359.

3. The court of appeals construed the relevant standards into a harshly discriminatory obstacle to participation by religiously oriented entities in governmental activities.

The court of appeals, further disregarding the constitutional mandate of neutrality toward religion, placed the burden on

appellants to prove that Title I did not and would not foster religion. 739 F.2d at 65. The Title I program thereby became presumptively unconstitutional. Furthermore, the court of appeals considered rebuttal of this presumption impossible no matter how much evidence appellants presented. *Id.* at 65 n.17. The presumption of unconstitutionality became conclusive.

The requirement that appellants prove the constant and complete absence of any and all religious influence on classroom activities, past, present, and future, even if it were not rendered logically impossible by the court's creation of an irrebuttable presumption, would still entail an unfair and discriminatory treatment of religious institutions. Were the same burden applied to governmental assistance to public school systems, or to any nonsectarian private schools, such assistance would also necessarily violate the Establishment Clause. No school could ever prove with absolute certainty that faculty or administrators who possessed strong religious beliefs did not on occasion, and would not ever in the future, whether consciously or unconsciously, communicate a religious value or act in response to religious convictions: "Focus exclusively on the religious component of *any* activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 104 S. Ct. at 1362 (emphasis added).

Indeed the very notion of enforcing a regime of complete ideological blandness would raise serious concerns regarding religious freedom rights under the First Amendment, and would vastly overstate the reach of the Establishment Clause. *See Lynch*, 104 S. Ct. at 1365-66; *Zorach*, 343 U.S. at 312-13. The Constitution prescribes that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion," *Schempp*, 374 U.S. at 225. Moreover, religious orientation cannot serve as a grounds for disqualifying a candidate for public office, *McDaniel v. Paty*, 435 U.S. 618 (1978) (delegate), or a recipient of public benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation); *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In combination, these rulings establish the principle that religious beliefs or orientation cannot serve to render individuals or institutions ineligible for participation in

government programs or operations: " 'No person can be punished for entertaining or professing religious beliefs . . . .' " *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961) (quoting *Everson*, 330 U.S. at 15-16). It follows that a per se rule against using the premises of a sectarian institution in the administration of government services has no basis in—and indeed works contrary to—constitutional interests embodied in the Religion Clauses.

C. Application of Flexible Standards of Analysis Upholds the Challenged Title I Program.

Proper application of the *Lemon* guidelines to the Title I program here challenged demonstrates the validity of that program under the Constitution.

In cases of governmental assistance to education, the initial "secular purpose" inquiry has created little conceptual difficulty, and typically presents no obstacle to the scrutinized programs. *Mueller*, 103 S. Ct. at 3066. The purpose inquiry essentially operates to disallow governmental activity clearly directed toward religious (or anti-religious, *Schempp*, 374 U.S. at 225) objectives. *E.g., Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments). A legislative scheme will survive the purpose inquiry unless "motivated wholly by religious considerations." *Lynch*, 104 S. Ct. at 1362. Educational assistance programs, such as the one here challenged, reflect the strong secular public interest in making quality education available for all children, and therefore easily survive the purpose inquiry.

Application of the second and third parts of the *Lemon* guidelines—the primary effect and excessive entanglement inquiries—has proved more problematic. *Wolman v. Walter*, 433 U.S. 229, 236 (1977) (plurality opinion). The court of appeals in the instant case, as discussed above, misconstrued these guidelines into an unnecessarily restrictive test which distorts the Establishment Clause and threatens interests underlying the Free Exercise Clause of the First Amendment. A flexible, reasoned application of these guidelines, however, sustains the validity of the challenged programs.

The Constitution does not forbid religion—it forbids the governmental establishment of religion. But, as discussed above, the Constitution also prohibits hostility towards, or discrimination against, religion. Hence the primary effect inquiry in school assistance programs, whether the recipient schools are public, private nonsectarian, or private sectarian, does not ask whether any religious influences impinge upon the facilities, teachers, or students, but rather whether the government has introduced such influences, *Engel v. Vitale*, 370 U.S. 421 (1962) (official school prayer), or selected the given facilities, teachers, or students on the basis of or in order to promote such influences. Neutrality commands that the religious orientation of would-be participants in a government program be a criterion neither for exclusion nor inclusion in the program. *Everson*, 330 U.S. at 18. Likewise, the accident of religious orientation, or lack thereof, of the participants in such a program may not serve as a basis for invalidating that program, when based upon a neutrally constructed and administered law. *Mueller*, 103 S. Ct. at 3070.

Administrators of the Title I program at issue here have gone to great lengths to ensure the absence of religious matter, activities, or influences from program operations, *see* 739 F.2d at 53. Their zealousness in this regard totally dispels any notion of intent to foster religion—if anything, their efforts partake of the same unnecessary hypersensitivity to religion which pervades the opinion of the court of appeals. In no case can the Title I program be regarded as directed toward the promotion of religion. Therefore the program survives the effect inquiry of the *Lemon* guidelines.

Finally, no excessive entanglement arises from the challenged program. The court of appeals based its ruling that the program was unconstitutional on the hypothesis that excessive entanglement would be necessary to enforce the absolute absence of religion from the conduct of the challenged programs. 739 F.2d at 66. Since this rigid abhorrence of the slightest religious element does not accord with proper constitutional analysis, the conclusion that "active and extensive surveillance" would be necessary, *id.*, cannot stand. Without this logical necessity for excessive en-

tanglement, the routine supervision of public school personnel in these programs by their public school superiors poses no entanglement difficulties.

CONCLUSION

In reversing the judgment of the court of appeals, this Court should emphasize that the Constitution does not regard religion as a dangerous contaminant, the avoidance of which places programs of aid to private schools in impossible dilemmas. Title I has successfully "chart[ed] a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970). The program should be upheld.

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record for
Amicus Curiae

OCTOBER 15, 1984